prohibited thing should not be done. The holding of this court, under the peculiar language of the policies involved and upon the basis of the facts disclosed, to the effect that

> "The naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, does not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy",

was clearly right.

The policy in the present case is entirely different. The policy in the present case (the original policy and the rider, as interpreted by the "Hand Book of Rules of West Virginia Fire Underwriters Association") permitted the keeping and using of gasoline upon the insured premises

> ". . . . for bottling automobile oils, offices and other occupancies not more hazardous . . ." ("Substituted Form" or rider.) (R. p. 3, 4.)

> ". . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and keep such materials as are usual in such occupancies". ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

> "It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Handbook of

> Rules of West Virginia Fire Underwriters Association.) (Caps ours.)

The policy provided, further, that

> ". . . . this company shall not be liable for loss or damage occurring.
> (b)—While the hazard is increased by any means within the control or knowledge of the insured."

Petitioner contended that after the fire three stills and quantities of gasoline were found on the insured premises. In order that the use of gasoline on the insured premises at the time of the fire might be held to constitute such violation of the policy as would absolve petitioner from liability, the burden rested upon petitioner to establish these two determining points: First, that the occupancy at the time of the fire was MORE HAZARDOUS than the bottling of automobile oils; and, Secondly, that the INCREASE OF THE FIRE HAZARD at the time of the fire was within the KNOWLEDGE OR CONTROL of the insured. The first of these two points petitioner failed to prove. The second point was decided by the jury ADVERSELY to petitioner. It is therefore submitted that the holding of the Circuit Court of Appeals, in view of the peculiar language of the policy involved and upon the basis of the facts disclosed (all so widely variant from those presented in the Gunther Case), to the effect that under the rider the tenant might keep or use gasoline upon the insured premises in unrestricted amounts in the bottling of automobile oils or in ANY OTHER OCCUPANCY NOT MORE HAZARDOUS, and so long as any increase of the fire hazard WAS NOT BROUGHT WITHIN THE KNOWLEDGE OR

CONTROL of the insured, was likewise clearly correct.

When the Gunther case came before this court for the second time, as reported in 134 U. S. 110, this court held that both policies were avoided by the drawing of carbon oil near a lighted lamp at dusk, because the policies permitted the drawing of oil by daylight only. Further discussion of the second Gunther case is therefore uncalled for, since the only point therein decided has no bearing, whatever, on the questions involved in the present case.

As contended above, it is apparent that the policies in the Gunther cases and the policy and rider in the present case differ in so far as they relate to the keeping, using and allowing of gasoline on the premises and as to the facts proved; and that the Gunther cases also differ from the present case as to the issues raised by the pleadings and determined by the jury.

An examination of both Gunther cases, will therefore disclose beyond all doubt or question that neither case is in any respect whatever, in conflict with the decision of the Circuit Court of Appeals in the present case.

2.

THE CASES OF IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY, 151 U. S. 452, and U. S. FIDELITY AND GUARANTY CO. v. GUENTHER, 281 U. S. 34.

We respectfully submit that the second ground urged, namely, that the decision of the Circuit Court of Appeals in the present case, is in conflict with the decision of this Court in Imperial Fire Insurance Com-

pany v. Coos County, 151 U. S. 452, and U. S. Fidelity and Guaranty Co. v. Guenther, 281 U. S. 34, is not in point.

The Circuit Court of Appeals in applying this rule of construction, was referring to an instruction relative to the "Increase of Hazard Warranty" and not to the "Prohibited Articles Warranty" as counsel for petitioner contend.

The following is quoted from the opinion of the Circuit Court of Appeals in this connection:

> "With respect to the Increased Hazard question, the policy provided as follows:
>
> 'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring * * * (b) while the hazard is increased by any means within the control or knowledge of the insured.'
>
> "We know of no authority contrary to the principle that an insurance policy will be construed in a manner most favorable to the insured. This has been held by this court. (Missouri State Life Insurance Company vs. Guess, 17 Fed. (2) 450, and cases there cited.)
>
> "In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company, 263 U. S. 167, Mr. Justice Sutherland said:
>
> 'The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own

> words should be resolved against it. First National Bank vs. Hartford Fire Insurance Co., 95 U. S. 673, 678-679; Thompson vs. Phenix Insurance Co., 136 U. S. 287, 297; Imperial Fire Insurance Co. vs. Coos County; 151 U. S. 452, 462.'
>
> "Here the judge below charged the jury in the language of the policy, and we think fairly. It is not incumbent upon the courts to write another or a different contract of insurance between the parties. Had the Insurance Company desired to add to the contract the words 'reasonable cause to believe or know', it should have written the same into the policy, and we are of the opinion that the action of the judge below was right with regard to this question." (R. p. 187.)

Apparently counsel for petitioner have misconstrued the opinion of the Circuit Court of Appeals in this connection, since by comparing counsel's argument on pages 36 and 37 of petitioner's brief, with that part of the opinion of the Circuit Court of Appeals above referred to, it is very readily apparent that counsel for petitioner are contending something altogether different from that which the Court held in its opinion.

The fact is that the Circuit Court of Appeals did not apply this rule of construction to the "Prohibited Articles Warranty" but only to an instruction under the "Increase of Hazard Warranty", which a reading of the above opinion will unquestionably substantiate. (R. p. 187.)

3.

THE CASE OF MILLER v. UNION ASSURANCE SOCIETY, 39 FED. (2) 25.

The third ground relied upon, namely, that the decision of the Circuit Court of Appeals, in the present case, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Miller v. Union Assurance Society, 39 Fed. (2) 25, is absolutely and positively without merit, which an examination of the Miller case, supra, will disclose beyond any question.

We do not believe that counsel for the petitioner are serious in this contention. The fact of the matter is that the Miller case was called to the attention of the Circuit Court of Appeals of the Fourth Circuit, in the present case, in an elaborate oral argument and also in the brief filed by counsel for petitioner in that Court.

The Miller case was a suit in Equity and a Court of Equity held that the insured had knowledge of the increase in the fire hazard. The decision was based upon entirely different circumstances than was the decision of the Fourth Circuit Court of Appeals in the present case.

In the Miller case the insured had his place of business for several months in the same building in which the unlawful business was being conducted by the tenant and the insured's son and agent was seen in the room where the stills were located. This fact, as well as the other evidence mentioned in the opinion, warranted the Court in the Miller case in holding that the hazard was increased WITHIN THE KNOWLEDGE AND CONTROL of the insured.

In the present case, the question of whether or not the hazard was increased within the knowledge and

control of the respondent was properly submitted to the jury under petitioner's instructions Nos. 2, 5 and 7 (R. p. 154, 155, 156), and the jury decided the fact as to whether the respondent or her agent had knowledge, ADVERSELY, to the petitioner. In other words, the jury found that the FIRE HAZARD WAS NOT INCREASED within the KNOWLEDGE AND CONTROL of the respondent or her agent.

Furthermore, the "work and materials clause" in the Miller case very materially differs from the "work and materials clause" in the present case. In the Miller case, the "work and materials clause" reserved to the occupant the right to use

> . "the premises as is usual and incidental to the business . . . as conducted therein . . . WHEN NOT IN VIOLATION OF ANY LAW." (Caps ours.) MILLER v. UNION ASSURANCE SOCIETY, 39 Fed. (2) 25, p. 30.

The "work and materials clause" in the present case contained no provision RELATIVE TO THE VIOLATION OF ANY LAW. This clause, in the present case, is as follows:

> "And FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such materials as are usual in such occupancies." (R. p. 4.) (Caps ours.)

The Miller case held that the storing and using of gasoline on the premises could not be justified or excused under the "work and materials clause" in that policy, because this clause in the policy contained a

provision that the business conducted on the premises WAS NOT TO BE IN VIOLATION OF ANY LAW.

The court said in the Miller case, 39 Fed. (2) 25 on page 30:

> "obviously and admittedly, the materials were used in violation of law as the premises were being used not only to violate the prohibitory laws of the Government but the revenue law as well."

If a fire insurance policy contains no express prohibition of illegal use such use by a tenant without the knowledge or consent of insured will not violate the policy.

BEHLER v. GERMAN MUTUAL FIRE INS. CO. 68 Ind. 347.

MARTIN v. CAPITOL INSURANCE CO. 85 Ia. 643, 52 N. W. 534.

NEBRASKA INSURANCE CO. v. CHRISTEINSEN 29 NEB. 572, 45 N. W. 924.

There being an express prohibition of illegal use in the "work and materials clause" in the Miller case, and no express prohibition of illegal use in the "work and materials clause" in the present case, it can very readily be seen that there is no conflict between the decision of the Circuit Court of Appeals of the Eighth Circuit in the Miller case and the decision of the Fourth Circuit Court of Appeals in the present case.

4.

IMPORTANCE OF PRESENT CASE

Counsel for petitioner argue that the present case does not involve merely a question of the correct interpretation of an isolated private contract, but presents a question of importance beyond the present case. (Petitioner's Brief p. 40.) This contention is far-fetched.

We cannot comprehend how the decision in behalf of the respondent in the present case, can in any way generally affect the so called "New York Standard Form of Fire Insurance Policy." This policy expressly provides that the articles mentioned in the "Prohibited Articles Warranty" are not to be kept, used or allowed on the insured premises without the written consent of the company. In the present case, written consent was given and attached to the policy, not only to keep and use the prohibited articles in unlimited amounts for the purpose of bottling automobile oils but for ANY OTHER OCCUPANCY NOT MORE HAZARDOUS. The insurance contract, in the present case, is made up of the rider containing the "work and materials clause," and a description of the occupancies permitted when read and construed with the original printed policy. The business of manufacturing and bottling automobile oils, wherein quantities of gasoline may be used in unrestricted amounts, wherein alcohol may be distilled for the purpose of making anti-freezing solutions for automobiles necessarily would incur a great fire risk. In the absence of any showing that any other occupancy was more hazardous than the occupancy of manufacturing and bottling automobile oils, it cannot be seriously contended that the occupancy

at the time of the fire was more hazardous than the occupancy when the rider was attached to the policy.

The "Substituted Form" or rider of the policy in question, in the present case, is partly typewritten and partly printed, and therefore peculiar to this particular policy itself. Nor is it urged by petitioner that the "Hand Book of Rules of the West Virginia Fire Underwriters Association" contains the same rule as the Hand Book of Rules of Fire Underwriters Associations in other states. The unrestricted quantities and the great latitude permitted in the keeping and using of gasoline under the policy, the "Substituted Form" or rider, and the "Hand Book of Rules" referred to, present nothing else other than an interpretation of an isolated private contract growing out of the use of the insured premises for the USE OF BOTTLING AUTOMOBILE OILS, offices and other mercantile purposes NOT MORE HAZARDOUS, and for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS.

We respectfully submit that the "New York Standard Form of Fire Insurance Policy" is in no way affected by the decision in the present case, only when a "Substituted Form" or rider is attached to the policy, specifically mentioning "the bottling of automobile oils" and ANY OTHER OCCUPANCY NOT MORE HAZARDOUS and when based upon the facts and circumstances as developed in the present case.

The fact is that the petitioner has done everything possible to keep from paying to respondent a just and rightful claim, and in line with its conduct in this connection it is endeavoring to make it appear, in urging this particular ground for a writ of certiorari, that the "New York Standard Form of Fire Insurance Policy",

wherever it may be in force, is affected by the decision of the Circuit Court of Appeals in the present case.

The statement of facts in the petition and brief of Counsel for petitioner do not give an accurate picture of the situation in the present case. Statements based upon the testimony in behalf of the petitioner, but denied by the respondent, are stated as facts, for instance, "the keeping and using of gasoline on the premises," all of which was denied by respondent, and certain wording contained in what is referred to as the "work and materials clause" is omitted. The "Substituted Form" or rider contains the words "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS." Counsel for Petitioner entirely omit and ignore these words "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS." (Petitioner's Brief p. 3, 15), and which are so important and significant in arriving at a decision in this case.

PARTS OF INSURANCE CONTRACT INVOLVED

The Printed Policy

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occuring. . . .

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED, or

(d) . . . THERE IS KEPT, USED OR ALLOWED on the described premises . . . GASOLINE . . ." (Printed Policy.) (R. p. 7.) (Caps ours.)

The "Substituted Form" or Rider

"Four thousand dollars on three-story brick building . . . occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS.

"Privileges Granted . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such MATERIALS as are usual in such occupancies." ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

Hand Book of Rules West Virginia Fire Underwriters Association

"Privilege . . . for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies.

"Note: It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Hand Book of Rules West Virginia Fire Underwriters Association.) (R. p. 92.) (Caps ours.)

The petitioner denied liability under two provisions of the policy, which for brevity may be called the "Increase of Hazard Warranty" and the "Prohibited Articles Warranty." (R. p. 12, 14.)

The policy provided as follows:

(1) Increase of Hazard Warranty.

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring . . .

(b) WHILE THE HAZARD IS INCREASED by any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED." (R. p. 7.) (Caps ours.)

(2) Prohibited Articles Warranty.

"Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring

(d) While there is KEPT, USED OR ALLOWED ON THE DESCRIBED PREMISES . . . GASOLINE . . ." (R. p. 7.) (Caps ours.)

Several months before the fire and after the policy had been issued and in force, at the request of the respondent through her agent, the building was inspected by petitioner's agent and there was attached to respondent"s policy as a "Substituted Form", a rider or endorsement permitting the keeping, using and allowing of gasoline on the premises, because the tenant at that time was manufacturing automobile oils and necessarily used GASOLINE in his manufacturing process. All of which is not denied by petitioner.

The ridet referred to is as follows:

"Four thousand dollars on three-story brick building . . . occupied for BOTTLING AUTOMOBILE OILS, OFFICES

AND OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil . . . and for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 3, 4.) (Caps ours.)

When this rider was added to the policy it entirely changed the printed provision of the policy known as the "Prohibited Articles Warranty" in so far as the keeping, using and allowing of gasoline was concerned, in that it permitted the keeping, using and allowing of those prohibited materials mentioned in the "Prohibited Articles Warranty" FOR THE PRESENT OR OTHER OCCUPANCIES NOT MORE HAZARDOUS; that is, it struck out the printed provision (d) in the "Prohibited Articles Warranty" and read into the policy in its place, the right to keep, use and allow the MATERIALS needed, in unrestricted quantities or amounts for BOTTLING AUTOMOBILE OILS AND OTHER PURPOSES NOT MORE HAZARDOUS. There can be no doubt that it was the intention of the parties, particularly of the petitioner, to permit the keeping, using and allowing of the prohibited materials mentioned in section (d) "Prohibited Articles Warranty" for the purpose of bottling automobile oils and OTHER OCCUPANCIES NOT MORE HAZARDOUS when it attached this rider to the policy.

If the premises were to be occupied other than for bottling automobile oils, that occupancy was not to be MORE HAZARDOUS than bottling automobile oils,

that is, it was not to be an occupancy which increased the fire hazard.

It must be remembered that under the rider OTHER OCCUPANCIES were permitted, so long as they were NOT MORE HAZARDOUS than the hazard incident to bottling automobile oils, that is, so long as the other occupancies did not increase the fire hazard.

The petitioner intended, when it attached this rider to the policy, that gasoline and other prohibited articles could be kept, used and allowed but the fire hazard should not be increased during other occupancies by any means within the knowledge and control of the insured.

The "Hand Book of Rules" required to be filed in the office of the Commissioner of Insurance of the State of West Virginia (R. p. 91) and in use by the West Virginia Fire Underwriters Association and which was used by the fire insurance companies doing business in West Virginia in 1925, defines what the term MATERIALS means as used in the rider referred to. On page 73 of this book is found the following:

> "Privilege for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 92.) (Caps ours.)
>
> "Note: It is understood that the word MATERIALS as used above, includes GASOLINE, and such other materials as are prohibited by the printed provisions of the policy when kept and used for such purposes as are usual to the occupancies permitted." (R. p. 92.) (Caps ours.)

The petitioner by its own interpretation of the word MATERIALS as used in the rider admits that it includes GASOLINE and the other prohibited materials mentioned in the printed provisions of the policy.

If it was the intention of the petitioner to free itself from liability providing prohibited materials were kept, used or allowed in occupancies that were more hazardous than permitted under the rider, then it should have stated in the rider that if any of the prohibited materials are kept, used or allowed in other occupancies that are more hazardous the Company would not be liable. This it did not do and it is very evident that it therefore relied upon the "Increase of Hazard Warranty" of the printed policy. (R. p. 7.)

That the rider completely changed the printed conditions of the policy there can be no doubt. A comparison of the provisions of the rider under PRIVILEGES GRANTED (R. p. 4) with the printed provisions of the policy (R. p. 7) will disclose just what was intended. The printed policy provides:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occuring
>
> (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered, in whole or in part by this policy." (R. p. 7.)

The rider contains the following:

> "PRIVILEGES GRANTED . . . for other insurance without notice until required." (R. p. 4.)

Clearly the printed provision of the policy prohibited other insurance while the rider permitted additional insurance.

Again the printed provision of the policy provides:

> "(c) While mechanics are employed in building, altering, or repairing the described premises beyond a period of fifteen days." (R. p. 7.)

The rider contains the following:

> "to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions."

So here again the printed provision of the policy prohibited alterations and repairs beyond a period of fifteen days while the rider permitted alterations and repairs to be made for sixty days at any one time. (R. p. 4.)

Again the printed provision of the policy provides:

> "(f) While a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days." (R. p. 8.)

The rider contains the following:

> "to be vacant not exceeding sixty consecutive days; to be unoccupied not exceeding sixty consecutive days." (R. p. 4.)

Here again the printed provision of the policy prohibited the premises to be vacant or unoccupied for not more than ten days while the rider permitted it to be vacant and unoccupied for sixty consecutive days.

Again the printed provision of the policy provides:

> "(d) While illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises; fireworks, greek fire, phosphorous, explosives, benzine, GASOLINE, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. p. 7.) (Caps ours.)

The rider contains the following provision:

> "To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than ten feet from artificial light, except incandescent electric light: . . . and FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 4.) (Caps ours.)

Here again section (d) has been completely changed.

It will be noted that the provisions of the printed policy, namely, sections (a), (c), (d) and (f), were all changed by the rider, while sections (b), (e) and (g), of the printed policy were not destroyed by the rider.

In other words, if the policy was redrafted in this connection, it would read substantially as follows:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring:
>
> (b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED; or
>
> (e) If the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M. or while it ceased to be operated beyond a period of ten days; or,
>
> (g) By explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." (R. p. 7, 8.)

WHEN THE RIDER IS ADDED TO THE ABOVE, THE POLICY IS COMPLETE.

The petitioner so construed the policy in this connection, because when we read its "Specifications of Defense" we find ITS OWN PLEADINGS alleges that the respondent or her agent WELL KNEW that GASOLINE, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon the insured premises.

Petitioner's "Specification of Defense No. 2" is as follows:

> "The defense says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed

upon and about the insured premises ALL OF WHICH WAS WELL KNOWN TO THE PLAINTIFF AND HER AGENT OR AGENTS, and was in violation of the foregoing condition and warranty." (R. p. 14.) (Caps ours.)

The petitioner cannot now complain or have a construction placed upon the policy in this case which is favorable to it, in view of the fact that the petitioner itself is responsible for the wording contained in the policy.

There is abundance of authority holding that where doubts arise as to the proper construction of clauses in insurance contracts that view which is most favorable to the insured must be adopted.

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company 263 U. S. 167, Mr. Justice Sutherland said:

> "The language employed is that of the Company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

FIRST NATIONAL BANK v. HARTFORD INSURANCE CO. 95 U. S. 673, 678-679;

THOMPSON v. PHENIX INSURANCE CO. 136 U. S. 287, 297;

IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY 151 U. S. 452, 462.

> "An insurance policy will be construed in a manner most favorable to the insured."

MISSOURI STATE LIFE INSURANCE CO. v. GUESS. 17 Fed. (2) 450 AND CASES THERE CITED.

"Courts do not favor forfeiture and where doubts arise will adopt construction of policy most favorable to insured and which will prevent annulment."

RAILWAY MAIL ASS'N v. MOORE. 15 Fed. (2) 547.

"It is well settled law that where doubts arise as to the proper construction of clauses in insurance contracts, that view of them must be adopted which is most favorable to the insured, and which will prevent a forfeiture of his rights under the policy. FORFEITURES ARE NEVER FAVORED BY THE COURTS." (Caps ours.)

BOOHER v. FARMERS' MUTUAL FIRE ASSOCIATION 91 W. Va. 468.

"Contracts of insurance are to be construed most strongly against the insurer and in favor of the insured."

SHINN v. W. VA. INS. CO. 104 W. Va. 353.

"If the language of a forfeiture clause in an insurance policy is susceptible of two constructions, the one more favorable to the insured is to be adopted."

BOLING v. CONTINENTAL INS. CO., 86 W. Va., 165.

In order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery

by the respondent, the petitioner must, under the terms of the policy, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE respondent or her agent. This it failed to do.

It cannot be doubted that, under the rider, any other occupancy NOT MORE HAZARDOUS was permitted. That, undoubtedly, means any occupancy which did not increase the fire hazard. Therefore, the policy and rider present two separate clauses relating to increase of hazard. One providing that:

> Gasoline shall not be kept, used or allowed in an occupancy where the hazard is increased.

And the other providing that:

> If the HAZARD IS INCREASED BY ANY MEANS, it must be within the knowledge or control of the insured.

It is very readily apparent that these two provisions relate to an increase in the fire hazard. And if there was an increase in the fire hazard at the time of the fire by the tenant then occupying the building WHICH WAS NOT PROVEN in order to excuse the petitioner from liability, the petitioner must, under the terms of the policy and rider, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE INSURED. THIS WAS THE PETITIONER'S OWN CONTENTION AND POSITION IN THE TRIAL COURT as shown by its "Specification of Defense No. 2" herein referred to (R. p. 14).

Clearly whether or not the hazard was increased within the knowledge and control of the respondent, was a question of fact for the jury to decide and being

a question of fact overwhelmingly supported by a preponderance of the testimony, the jury found for the respondent.

The Court in the case of ROYAL EXCHANGE ASSURANCE COMPANY v. THROWER said on page 816.

> "It is this language 'WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED' that differentiates policies like this from many policies as to which it has been held that the act of the tenant is the act of the landlord." (Caps ours.)
>
> ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 816, Affirmed 246 Fed. 768.

The following is quoted from the opinion of the Court in the above case on pages 814, 815:

> "That the insured ought to have known, must have known, should have known, is not enough. The insured must have knowledge of the particular use to which the building was being put by the tenant. The language is 'any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED.' To control the matter it would seem to be necessary that the insured should have had some knowledge of what was being done in the building. It does not seem that an owner can be held to the duty of controlling that of which he does not know. The duty to control involved, reasonably and fairly, some knowledge of the hazardous use of the building; otherwise the forfeiture would be worked simply because the

insured was the owner of the building, and the people who caused the hazard were his tenants. The language of the policy would be given no effect, that the forfeiture should result from the increased hazard by means within the CONTROL OR KNOWLEDGE of the insured. There is abundant authority for holding that, where there was language like this in the policy, the owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 814, 815. Affirmed 246 Fed. 768.

In the case of FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION, the Court held:

"Where owner of dwelling house rented building for dwelling house purposes without knowledge that tenant was operating a STILL therein POLICY OF FIRE INSURANCE COVERING BUILDING WAS NOT AVOIDED BECAUSE OF INCREASE OF HAZARD OR CHANGE OF OCCUPANCY BY REASON OF OPERATION OF STILL BY TENANT." (Caps ours.)

FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION 278 PAC. (MONT) 509 (June 1929).

In the case of COLKER v. CONNECTICUT FIRE INSURANCE COMPANY the Court held:

". . . where the insured leased part of his building to a tenant FOR STORAGE

> PURPOSES, the insurer was not released from liability or loss through fire by fact that tenant, without knowledge or consent of insured, operated a still on premises; PROVISION FOR AVOIDING POLICY BECAUSE OF INCREASED HAZARD NOT RELIEVING INSURER FROM LIABILITY IN SUCH CASE." (Caps ours.)
>
> COLKER v. CONN. F. INS. CO., 290 S. W. (Ky.) 1073.

In the case of RAGLEY v. NORTHWESTERN INSURANCE COMPANY the Court held:

> ". . . that where owners renting house insured for dwelling house purposes had no cause to believe that dwelling was used for manufacture of liquor THEY WOULD NOT BE CHARGEABLE WITH MANUFACTURE OF LIQUOR AT THE TIME OF FIRE, SO AS TO RENDER POLICY VOID, even though such manufacture was such as might, as against tenant, be regarded as one of the principal uses of the house." (Caps ours.)
>
> RAGLEY v. NORTHWESTERN INS. CO., 276 Pac. (Wash.) 537.

INCREASE OF RISK

While the respondent emphatically denies that there was any gasoline on the premises at the time of the fire, yet in order to fully present all the questions involved, to the Court for its consideration, we are assuming for the sake of comparison that certain testimony given

for the petitioner, even if true, would but tend to show, that the use of the premises by the tenant, Varisca, in the manner described by the Petitioner's witness, Doerr, did not in any respect increase the risk so far as the fire hazard was concerned when compared with the risk assumed by the petitioner at the time the tenant Huff occupied the premises in question. It was, of course, the duty of the petitioner to prove that there was an increase of hazard, which petitioner did not do. That is, that the fire risk to the building was increased when it was occupied by the tenant Varisca, as compared with the risk assumed when occupied by the tenant, Huff.

The rider heretofore referred to, page 3 of the Record, established the manner in which and the purposes for which the building could be occupied and the risk permitted thereunder.

For the purposes of this argument, let us assume that the fire had occurred in the building during the occupancy of the tenant Huff, and that at the time of the fire, Huff was manufacturing automobile oils, and in that connection had stored on the premises quantities of gasoline and was also using gasoline for the purpose of operating a still, to make alcohol, such alcohol to be used in connection with his business of bottling automobile oils, and that according to his testimony (R. p. 130) he was using HOTPLATE in connection with the operation of the still.

And also further that Huff, at the time of the fire, was operating a still with gasoline for the purpose of distilling water to be used in the process of manufacturing and bottling automobile oils.

Under these circumstances and conditions, could it

be said that the petitioner would not be liable under the rider which was attached to the policy?

Surely, in view of the fact that gasoline and other prohibited articles were permitted to be used, kept and allowed in unrestricted amounts, and in further view of the fact that there were no restrictions as to how the gasoline and other articles were to be used, so long as they were used in connection with bottling automobile oils, the petitioner would undoubtedly be liable. And yet, so far as the petitioner's case is concerned, considering the testimony of its witness, Doerr, and assuming merely for the sake of the argument that he detailed the facts as found with reference to the still, then we respectfully submit we have the identical situation presented, as that heretofore outlined in case Huff had been operating his business at the time of the fire.

The witness, Doerr, testified (R. p. 59) in detailing the apparatus found in the building:

> "The still was upon a HOTPLATE, operated by a gasoline compressor tank, or rather fed from a gasoline compressor tank."

showing in this respect the similarity of the operation, the use of the same apparatus, to-wit, hotplate, and consequently no increase so far as the risk or hazard would be concerned.

Operated in identically the same manner, the use of the still for manufacturing liquor, could not be more hazardous, than the manufacturing of alcohol by stills or the making of distilled water on the part of Huff. It may be urged, however, that the use of stills for manufacturing liquor was illegal, and therefore more haz-

ardous; this contention, however, is not well taken, since it must be remembered that there was no provision in the policy which made the polity void if the insured premises were being occupied for an unlawful or illegal purpose.

It must also be remembered that it was the duty of the petitioner to prove there was an increase of hazard. It was, therefore, incumbent upon it to prove that the keeping, using and allowing of gasoline on the premises for the operation of stills increased the fire risk during the occupancy of the building by Varisca, and that this was a greater risk than was permitted under the occupancy of Huff. This petitioner did not do; and in view of such failure then there can be no question but that the verdict of the jury in finding for respondent was correct and just.

CONCLUSION

IN CONCLUSION, in this respect we beg to submit that taking into consideration the policy and the rider and the law governing the interpretation of this particular policy, the respondent had the right to have gasoline on the premises in unlimited quantities, and if perchance it was used in an unlawful or illegal business, then the use of it in such case had to be with the knowledge and under the control of the respondent before she could be denied the right to recover in this case, assuming, of course, that the illegal or unlawful business did not increase the fire risk and was, therefore, not more hazardous.

For the foregoing reasons, respondent prays that a writ of certiorari be denied.

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